DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

(Syllabi prepared by M. P. Burks, State Reporter.)

THURSTON v. HUDGINS AND OTHERS*.—Decided at Richmond, January 24, 1895.—*Buchanan*, J:

1. OYSTER INSPECTORS.—*Duties quasi judicial—Mandamus—Acts already done.* The duties imposed upon an oyster inspector under the provisions of sections 2137 and 2153 of the Code relating to the location of oyster grounds are *quasi* judicial, and he cannot be compelled by *mandamus* to exercise the discretion vested in him in any particular manner. Nor will a *mandamus* lie to compel him to undo what he has done in the exercise of his judgment and discretion, and to do what he had already determined should not be done.

MANGUS v. MCCLELLAND.—Decided at Wytheville, June 27, 1895. *Keith*, P:

1. EQUITABLE DEFENCES AT LAW.—*Sec. 3299 of Code.*—A plea by way of special set-off under section 3299 of the Code cannot be relied on which sets up equitable grounds of defence which require a rescission of the contract in suit, and a re-investment of the vendor with the interest alleged to have been sold. This defence can only be made in a court of equity.

2. CONSTRUCTION OF STATUTES—*Effect of re-enactment after having been construed.* Where a statute has been construed by the courts and afterwards re-enacted by the legislature, the construction given to it by the courts is presumed to have been sanctioned by the legislature and thenceforth becomes obligatory upon the courts.

EXCHANGE AND DEPOSIT BANK AND OTHERS v. FUGATE AND OTHERS.—Decided at Richmond, January 15, 1896.—*Keith*, P. Absent, *Cardwell* and *Buchanan*, JJ:

1. USURY—*Sums appropriated to interest by borrower and lender—Recovery back—Limitations.* Where the borrower and the lender have agreed to appropriate, and have actually applied payments made by the borrower, to the extinguishment of the interest as it accrued on the sum loaned, the borrower cannot, after the lapse of nearly six years, recover back the amounts so paid, even though the interest be in excess of the rate allowed by law. But where usurious interest is charged in the original note, it should be expunged and a decree rendered for the residue with interest thereon from the date of the decree.

SPILMAN, ADAMS & CO. v. GILPIN.—Decided at Richmond, November 19, 1896.—*Keith*, P. (Judges *Harrison* and *Buchanan* dissenting):

1. CHANCERY PRACTICE—*Continuance—Rehearing—Verbal agreements of coun-*

*The first three cases have only recently been directed to be reported.

sel—Case at bar. Refusal to continue a chancery suit, in a proper case for a continuance, is good ground for a motion to rehear an interlocutory decree, but the decree should, as a general rule, show that a motion for a continuance was made and overruled. If, however, the decree fails to show that the motion was made, but it is averred in the petition for rehearing, and not denied, this is sufficient. The granting of a rehearing to an interlocutory decree is a matter within the sound discretion of the court, and courts are more liberal in granting rehearings than in reviewing final decrees, especially if a case has not been heard on its merits. Verbal agreements of counsel, especially if disputed, will as a rule be disregarded, but if such agreement results in surprise to one of the parties, and is likely to work injustice to him, the court may grant him relief on equitable terms. In the case at bar, the petition for rehearing presents a case in which the petitioner has a defence to the claim asserted against him, which, if presented at the proper time, would have been a complete answer to the claim, but which was not presented at the proper time because petitioner's counsel honestly believed that an agreement existed between him and the opposing counsel that the cause was to await the hearing of another cause in the same court, involving the same question, in which depositions had been taken, and that the depositions should be read in both causes, and therefore had not taken proof in petitioner's cause. Under these circumstances the rehearing should have been granted.

COOL V. COMMONWEALTH.—Decided at Richmond, December 3, 1896. *Keith*, P:

1. CRIMINAL LAW—*House breaking—Indictment—Time when offence committed.* An indictment for breaking and entering a "mill-house" with intent to commit larceny therein, must charge the time at which the alleged breaking and entering took place, for if done between February 12, 1894, and January 9, 1896, the offence was not a felony, while if done before the first date, or after the latter, the offence is a felony. Time is of the essence of the offence.

BENJAMIN & CO. V. MADDEN.—Decided at Richmond, December 3, 1896.—*Riely*, J:

1. FRAUD PER SE.—*Retention of personal property after sale—Presumption—Case at bar—Sec. 2877 of Code.*—The retention of the possession of personal property by the vendor after an absolute sale is *prima facie* fraudulent against *creditors* of the vendor, but not as against a *subsequent purchaser* for value, without notice of the prior sale, but this presumption may be rebutted by proof. In the case at bar there was a *bona fide* sale for value of a stock of goods, and delivery of possession, and the facts that the vendor did not transfer his license to the vendee before levy on the stock; that the name of the vendor upon the window shades, which had constituted his only sign, remained as before; and that the vendor and his former clerk remained in the store and sold goods, do not, in view of other evidence in the cause, establish a case of fraud upon creditors of the vendor. Nor, under the admitted facts, does sec. 2877 of the Code apply.